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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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I

Reference to Official Reports of Opinions Delivered in the Court Below

The petitioners' reference to the opinions below is correct.

II

Counter-Statement Concerning Jurisdiction

We respectfully submit that the decision of the Superior Court of New Jersey, Appellate Division, 74 N. J. Super. 257, 181 A. 2d 184, involved no State statute repugnant to the Constitution of the United States; no title, right, privilege, or immunity was specially set up or claimed under the Constitution of the United States, nor did the said Court decide any federal question of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

We respectfully submit that the decision of the Superior Court of New Jersey, Appellate Division, 80 N. J. Super. 176, 193 A. 2d 270, rests on well settled non-federal procedural grounds and therefore, involves no right, privilege or immunity under the Constitution of the United States.

We further respectfully submit that the decisions below are in conformity with the provisions of the Federal Constitution and represent no departure from the applicable decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction by issuing a writ of certiorari to review the decisions of the Court below.

Counter-Questions Presented

1. Have the petitioners' constitutional rights against unreasonable search and seizure been violated when said petitioners, having had every opportunity to raise the *Mapp* issue by way of direct attack in their appeals to the State Courts, failed to ever question the legality of the search and seizure or the admissibility of the fruits thereof during the course of direct review?

2. Does the Constitution of the United States guarantee to these petitioners an opportunity to raise the illegality of a search and seizure via collateral attack upon their final judgments of conviction, when as a matter of State procedure, the Courts of New Jersey have determined that collateral attack shall not serve the office of direct appeal?

III

Counter-Statement of the Case

The petitioners were arrested on July 14, 1960, when State enforcement officers as well as local police, armed with a search warrant, raided premises owned by them. The search resulted in the discovery of more than $265,000.00 in cash, as well as an assortment of adding machines; paper and canvas money bags, money wrappers, adding machine tapes, and a large number of envelopes bearing number slips and plays.

On May 18, 1961 after a four day jury trial during which the legality of the search was never raised, the petitioners were found guilty on four indictments ranging from conspiracy to maintaining a nuisance.

Mapp v. *Ohio*, 367 U. S. 643, was decided by this Court on June 19, 1961, and on June 23, 1961, during an application for a stay of the execution of sentence pending appeal, petitioners' then counsel, Mr. Slurzberg, urged that there existed a substantial question of law generated by *Mapp* which the appellate courts should rule upon. Counsel further believed that this exclusionary rule would be applied retroactively thereby coming within the orbit of the case *sub judice* (page 8 *infra*).

On June 26, 1961, with full knowledge of the *Mapp* decision and its ramifications, petitioners appealed to the

Appellate Division of the Superior Court of New Jersey without ever raising the *Mapp issue*. On November 6, 1961, *State* v. *Valentin*, 36 N. J. 41 (1961) was decided and the Supreme Court of New Jersey indicated its willingness to apply the exclusionary rule to a pre-*Mapp* search and seizure by remanding so that evidence could be taken on the legality of the search. On November 30, 1961, New York's highest court decided it would apply *Mapp* to pending appeals from pre-*Mapp* convictions, *People* v. *Loria*, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462, 179 N. E. 2d 478 (Ct. App. 1961).

On February 26, 1962, the case *sub judice* was argued before the Appellate Division of the Superior Court of New Jersey at which time *Mapp* was never raised. On June 4, 1962, the Supreme Court of New Jersey held that *Mapp* had retroactive effect on pre-*Mapp* searches, and that it would accept the *Mapp* issue on direct appeal from a pre-*Mapp* conviction in, *at least*, cases in which the record suggested a basis for questioning the reasonableness of the search, *State* v. *Smith*, 37 N. J. 481 (1962). On June 25, 1962, petitioners filed their Petition for Certification in the Supreme Court of New Jersey, and once again the search, seizure or the introduction of evidence at the trial was never challenged, although the avalanche triggered by *Mapp* was well underway.

Certification was denied by the Supreme Court of New Jersey on September 17, 1962. Thus, during the entire proceeding on direct appeal within the State court, there was no attempt made to project the *Mapp issue*, although counsel for the petitioners had previously stated that *Mapp* was applicable to the case (page 8 *infra*).

It was only on October 15, 1962, after all direct appeals were exhausted, that the petitioners for the first time attempted to raise the search and seizure issue presented in *Mapp* v. *Ohio*. Having delayed for approximately one year and a half, the petitioners' Motion to Vacate the Judgments

of Conviction and for a New Trial was untimely brought under R.R. 3:7-11, however, the Superior Court of New Jersey, Appellate Division, treated the Motion as an attempt to seek the Court's aid under R.R. 3:11-9. The Appellate Division affirmed the trial court's denial of the aforesaid Motion and the Supreme Court of New Jersey denied certification.

IV

The Argument

Petitioners' trial began on May 15, 1961 and continued to May 18, 1961, when the jury returned a verdict of guilty. At no time during the trial did the petitioners object to the admission of any evidence obtained as a result of the search of July 14, 1960. This inaction, we must admit, was excusable since the petitioners couldn't be charged with failing to anticipate *Mapp*. From this point on, however, their failure to raise the *Mapp* issues was without justification.

On sentencing day, June 23, 1961, petitioners were well aware of the *Mapp* decision and, if the remarks of their State appellate counsel are any indication, were well convinced that *Mapp* applied to their convictions. Nevertheless, despite the hints contained in *State* v. *Valentin*, *supra*, and the precedent set by New York's *People* v. *Loria*, *supra*, petitioners failed to raise this issue in the Appellate Division. Whatever doubts defendants might have retained as to the efficacy of such an assertion should have been quickly dispelled by *State* v. *Smith*, *supra*. Nevertheless, petitioners again failed to raise the issue in their subsequent Petition for Certification.

Early in the *Mapp* opinion, Mr. Justice CLARK quotes *Byars* v. *United States*, 273 U. S. 28, 29-30 (1927) to the effect that the exclusionary rule is only available "where a timely challenge has been interposed" and it is later explicitly stated in *Mapp*, footnote 9, page 659 that:

"As is always the case, however, State procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

One of New Jersey's cardinal procedural principles is that collateral attacks will not be allowed to do service for an appeal: *State* v. *Jenkins*, 32 N. J. 109, 117 (1960); *Janice* v. *McCorkle*, 52 N. J. Super. 1, 19 (App. Div. 1958); *In re Robilotto*, 24 N. J. Super. 209, 211 (App. Div. 1953). Due regard for the orderly administration of justice and the policy of finality of judgments are among the reasons advanced for the existence of this rule. This antipathy toward collateral attack and piecemeal review has been stated on many occasions by this Court; *Sunal* v. *Large*, 332 U. S. 174 (1947); *Cleary* v. *Bolger*, 371 U. S. 392 (1963); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274 (1942); *Daniels* v. *Allen, sub nom. Braum* v. *Allen*, 344 U. S. 433; *Chovez* v. *Dickson*, 280 F. 2d 727, 733 (9th Cir. 1960) cert. den. 364 U. S. 934 (1961).

It is also not without significance that before the advent of *Mapp*, the lower federal courts have consistently adhered to the rule that the issue of admissibility of unconstitutionally seized evidence may not be raised on collateral attack; *United States* v. *Zarade*, 291 F. 2d 189, 191 (6th Cir. 1961); *Alexander* v. *United States*, 290 F. 2d 252, 254 (5th Cir. 1961); *Jones* v. *Attorney General of the United States*, 278 F. 2d 699, 701 (8th Cir. 1960). Furthermore, collateral attack has been consistently denied by our sister states; *People* v. *Muller*, 11 N. Y. 2d 154, 227 N. Y. S. 2d 421, 182 N. E. 2d 99 (Ct. App. 1962), cert. den. 371 U. S. 850; *Petition of Dirring*, 183 N. E. 2d 301 (Sup. Jud. Ct. Mass. 1962); *Moore* v. *State*, 146 So. 2d 734 (Ct. App. Ala. 1962); *Commonwealth* v. *Myers*, 199 Pa. Super. 341, 185 A. 2d 806 (Super. Ct. 1962). See also *In re Harris*, 366 P. 2d 305, 16 Cal. Rptr. 889, 890-94 (Sup. Ct. 1961) concurring opinion.

Lastly, it is submitted that the decision sought to be reviewed rests on adequate grounds of State procedure which do not present or constitute a federal question, *Carter* v. *People of State of Illinois*, 329 U. S. 173, 175; 67 S. Ct. 216, 91 L. Ed. 172 (1946); *Young* v. *Ragen*, 337 U. S. 235, 238, 69 S. Ct. 1073, 93 L. Ed. 1333, (1948); *Milk Wagon Drivers' Union of Chicago, Local 753* v. *Meadowmoor Dairies, Ill.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941).

CONCLUSION

The attempt by petitioners to have their matter reviewed by the Supreme Court of the United States should fail because the Constitutional rights or privileges which the petitioners now claim were never properly raised in the State Courts on direct review. The decisions sought to be reviewed were based on well-settled State decisional law which is in accord with the decisions of this Court and that of our sister-states. There has been no substantial federal question raised meriting review by this Court and based upon all these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[Appendix Follows]

APPENDIX

Excerpts from Argument on Application for Stay of Execution of Sentence Pending Appeal of the Bergen County Court, Law Division (June 23, 1961)

(commencing at 21-19)

The Court: Tell me.

Mr. Slurzberg: I don't know whether your Honor is familiar with the fact that on Monday of this week an opinion was rendered, and in light of that opinion—and I am sorry that the official opinion is not available—but I am satisfied that there is in this case a meritorious and substantial (22*) question of law that the appellate courts should consider with respect to whether or not the subpoena upon which this arrest was made—

The Court: You mean the search warrant.

Mr. Slurzberg: —was valid, and whether the taking of all the monies was valid.

I believe that in light of the law that came down by the Supreme Court effective and retroactive because it came out before the imposition of sentence, is a matter that an appellate court should weigh.

In this case it is a matter of novel importance. It has never been made before. There is no criticism to the court, to this court, with respect to the merits. It is within the orbit of this case. It is something that is important enough to warrant a stay, so that the appellate courts can rule upon it.

I feel that squarely in this case it comes within the decision of the United States Supreme Court and it is a substantial question because, otherwise I don't think I could raise it.

* * *

*All figures in parentheses indicate the number of each new page of the stenographic transcript.